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No. 95-208

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

TYLER MURRAY, by and through his parents and next friends, John and Myrna Murray,
Petitioner,

v.

MONTROSE COUNTY SCHOOL DISTRICT RE-1J, a school district of the State of Colorado,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE OF THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AND THE COLORADO DEVELOPMENTAL DISABILITIES PLANNING COUNCIL IN SUPPORT OF CERTIORARI

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August 23, 1995

BEST AVAILABLE COPY

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The National Association of Protection and Advocacy Systems ("NAPAS") and the Colorado Development Disabilities Planning Council ("Colorado Council") move for leave to file a brief as amici curiae in support of the petition for writ of certiorari in this case, and in support of their motion represent:

1. Amici participated before the Tenth Circuit Court of Appeals. The Petitioners, whose position amici support, consent to the filing of this brief. The Respondents do not consent to the participation of these amici at this stage.

2. In the Tenth Circuit these amici filed two separate briefs. In this Court amici propose to file a single joint brief in support of the Petition for Writ of Certiorari.

3. Amici are strongly interested in the subject matter of this case. NAPAS is a membership organization of protection and advocacy agencies for persons with disabilities. These agencies frequently encounter issues similar to those raised in this case. In fiscal year 1994 protection and advocacy agencies served well over 600,000 individuals. NAPAS represents its members on related issues before all branches of the federal government. The Colorado Council is an advisory body established under federal and state law. In its capacity as an advisory body the Colorado Council has developed a formal policy which advocates, *inter alia*, the value of educating children with disabilities in neighborhood schools.

4. In the view of amici the statute at issue, 20 U.S.C. § 1412(5)(B), is not interpreted or enforced consistently. This is reflected in a split in decisions of the circuit courts of appeals and this Court's guidance on the proper application of this section would be of assistance to parents, children, school districts and state educational agencies.

5. Amici believe the circumstances of this case will make it appropriate for this Court to provide for consistent and predictable enforcement of 20 U.S.C. § 1412(5)(B).

6. Amici believe the Tenth Circuit decision gives insufficient weight to the interests of parents of children with disabilities in choosing the public school their child will attend and insufficient weight to the importance of neighborhood schooling for these children.

7. The description of the split in the circuit courts in the brief of amici is broader than that reflected in the Petition for Writ of Certiorari and the legal issues of the importance of neighborhood schooling and parental choice are presented more thoroughly in the brief of amici. Both matters bear on the disposition of this case, as discussed in the brief.

WHEREFORE, amici respectfully request that leave to file the following brief as amici curiae in support of petition for writ of certiorari be granted.

Respectfully submitted,

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INTEREST OF AMICI

The National Association of Protection and Advocacy Systems (NAPAS) was founded in 1981 as a membership organization of protection and advocacy agencies. Protection and advocacy agencies are established under the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000 - 6083, and related statutes, to provide legal representation and advocacy on behalf of persons with disabilities. The Colorado Developmental Disabilities

Planning Council ("Council") is an advisory and advocacy body, created pursuant to the Developmental Disabilities Assistance and Bill of Rights Act and Colorado Law.

The constituent protection and advocacy organizations of NAPAS all engage in representation of parents and children in proceedings under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 - 1485, ("IDEA"). NAPAS also provides protection and advocacy agencies with training and technical assistance and represents their interests before all branches of the federal government. Enforcement of 20 U.S.C. § 1412(5)(B), the subject of this case, is a leading issue which arises in IDEA cases handled by the members of NAPAS.

The Council, in its advisory capacity, has adopted a formal policy favoring neighborhood schooling as an element of full inclusion of children with disabilities in natural school settings. Amici both view § 1412(5)(B) as a basic element of the IDEA and fundamental to that Act's effort to integrate and normalize the education of children with disabilities. It is the experience of amici that this statute is an underenforced provision of the IDEA and one that is the subject of ongoing controversy.

Amici are thus strongly interested in both securing greater compliance with this important element of the IDEA and clarifying its meaning. Amici view this case as an appropriate one in which to pursue those ends.

SUMMARY OF ARGUMENT

The IDEA's least restrictive environment provision is the subject of a split in the circuits over the test to be followed when more restrictive educational settings are proposed by

a school district or by parents. This split affects an issue which arises daily in administration of the IDEA and, thus, this Court's guidance is needed. This case is an appropriate one in which to reach and resolve this issue.

This Court has long recognized the important role of parents in the education of their children. The IDEA emphasizes and supports that role in the case of parents of children with disabilities. Further, at this time public school choices are expanding for all children. The Tenth Circuit decision cuts back on parents' right to choose the school their child will attend. This is inappropriate under the IDEA and at a time when public schools of choice are expanding.

The Murrays sought the traditional alternative of neighborhood schooling for Tyler. This choice deserves more weight than it was given in the Tenth Circuit decision.

ARGUMENT

I. THE CIRCUIT COURTS OF APPEALS ARE SPLIT ON THE PROPER INTERPRETATION OF THE IDEA'S LEAST RESTRICTIVE ENVIRONMENT PROVISION AND THIS COURT'S GUIDANCE IS NEEDED

The IDEA requires education of children with disabilities in what is commonly termed the least restrictive environment or LRE. 20 U.S.C. § 1412(5)(B). *See also*, 20 U.S.C. § 1407(b) (protecting regulations regarding, *inter alia*, "least restrictive environment"). This Court has not rendered a decision focusing on or giving a definitive interpretation to this statute. The Circuit Courts of Appeals are badly divided on the test to be followed in analyzing LRE issues.

In *Roncker v. Walter*, 700 F.2d 1058, *cert. denied*, 464 U.S. 864 (1983), the Sixth Circuit looked first to whether the more restrictive setting is "superior." *Id.* at 1063. If this is considered superior, then one asks whether the superior characteristics can be imported into the less restrictive setting. If so, the less restrictive setting must be modified and the child must be placed there. As the Tenth Circuit decision noted, the Fourth and Eight Circuits also apply this test. 51 F.3d at 926 n.10 (*citing Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876 (4th Cir. 1989) *and A.W. v. Northwest R-I Sch. Dist.*, 813 F.2d 158 (8th Cir.), *cert. denied*, 484 U.S. 847 (1987)). In a variation on this rule, the Seventh Circuit found that where the parties disagreed on the "best" educational methodology and the different methods resulted in differing levels of restrictiveness, the LRE issue was subsumed by the dispute over methods. *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 296, *cert. denied* 488 U.S. 925 (1988).[1] As with *Roncker*, the *Lachman* court looked to which setting was superior. *See also Wilson v. Marana Sch. Dist.*, 735 F. 1178, 1182 (9th Cir. 1984).

In contrast, in *Daniel R.R. v. Board of Educ.*, 874 F.2d 1036 (1989), the Fifth Circuit held that education should take

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[1] Because *Lachman* classified the issue as one of methodology, the court deferred to the local education agency. Such deference has been squarely rejected by, among others, the Eleventh Circuit in *Greer ex rel. Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991). There, the court viewed LRE as a part of the IDEA on which deference was not appropriate. The issue of deference in LRE disputes could be framed as a separate split in the circuits. However, it is equally plausible to view different approaches to deference as an outcome of the application of one test, or another, to unique facts.

place in the least restrictive setting if that placement is or can be made "satisfactory." *Id.* at 1048. If this is not possible, the inquiry turns to whether the child has been placed in the least restrictive setting which is appropriate. *Id.*[2] Again, as the Tenth Circuit decision acknowledges, the Third Circuit in *Oberti v. Board of Educ.*, 995 F.2d 1204 (1993) and the Eleventh Circuit in *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, follow the *Daniel R.R.* test. 51 F.3d 926 n.10. Also, the First Circuit appears to have adopted this rule, holding that a child who can make progress should not be placed in a more restrictive setting, even if this would "'more nearly enable the child to reach his or her full potential.'" *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083 (1993) (quoting *Abrahamson v. Hershman*, 701 F.2d 223 (1st Cir. 1983)).[3] On this theory, inability to provide a free, appropriate public education ("FAPE"), as defined by this Court in *Board of Educ. v. Rowley*, 458 U.S. 176 (1982), becomes the test of whether a child may be placed in a more restrictive setting. Under *Rowley*, provision of FAPE requires that a child make some educational progress.

Most recently, the Ninth Circuit adopted a third approach which balances considerations of quality and restriction. *Sacramento Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398,

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[2] The *Daniel R.R.* court used the term "mainstreaming." We use "least restrictive environment" because the different tests can be applied to any aspect of LRE.

[3] The holding in *Lenn* can be distinguished on the basis that it is a private placement case. The reasoning of the decision, however, makes it clear that the court is discussing the general relationship between LRE and provision of an adequate education.

cert. denied, 114 S.Ct. 2679 (1994). Thus, the comparative benefits of the two placements (and possible accommodations in the less restrictive placement) are considered.

These three approaches cannot be reconciled.[4] The *Roncker* test allows placement in a more restrictive environment -- at the behest of parents or a school district -- upon a showing of the "superiority" of the more restrictive program (unless that superiority can be replicated in the less restrictive program). In contrast, under one version of the *Daniel R.R.* test, one does not look to which setting is better, but only to whether the less restrictive setting provides FAPE. The *Rachel H* test allows consideration of which setting is better, but balances this against the advantages of less restrictive settings -- that is, the educational and social advantages that lead Congress to adopt § 1412(5)(B). Thus, in a given case the "balance" may favor the less restrictive setting or the "better" setting.

LRE questions arise daily in the administration of the IDEA. With the basic division in the circuits over what the statute means, this Court's guidance is needed.

To be sure, the Tenth Circuit decision labors to avoid taking any position on this conflict. Nonetheless, this case is a fully appropriate vehicle for resolving this issue. As Petitioner has persuasively shown, LRE analysis is unitary and cannot be sensibly subdivided into parts labeled "preference" versus "presumption." Whatever the proper test is, it should have been applied to the facts of this case.

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[4] All three approaches allow for consideration of additional factors which are not relevant to the conflict outlined here.

II. THE DECISION BELOW GIVES INSUFFICIENT WEIGHT TO THE IMPORTANCE OF PARENTAL CHOICE UNDER THE IDEA AND THE IMPORTANCE OF NEIGHBORHOOD SCHOOLING TO CHILDREN WITH DISABILITIES

Beyond the division in the circuits, the Tenth Circuit decision creates extreme limitations on the role of parents in the education of their children with disabilities. This Court has long recognized the "power of parents to control the education of their own." *Meyer v. Nebraska*, 262 U.S. 390, 410 (1923). "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligation." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). Thus, the state may not "deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful." *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927).

Meyer, *Pierce* and *Farrington* focus on state restrictions on private schooling.[5] The history of public education, in contrast, is largely one of plenary state control over the schools children attend as well as the instruction offered. Certainly, this was true of children with disabilities. When the IDEA passed an eighth of all children with disabilities were excluded from public schools. 20 U.S.C. § 1401. Another half of these children were warehoused in institu-

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[5] However: "[t]hose who . . . seek public education for their children should not be forced to forfeit all interest or voice in the school their child attends." *Keyes v. School Dist. No. 1*, 413 U.S. 189, 246 (1973) (Powell, J., concurring in part and dissenting in part).

tions with minimal education or placed in public schools but given no support. *Id.* Parents were given little or no say in the education of their child with a disability. Indeed, with a few exceptions, *non*disabled children went where they were assigned. Most students went to neighborhood or community schools and this was not controversial. Still, such choices as there were remained a unilateral prerogative of school officials. Because this power was abused with children with disabilities, Congress sought to give parents more meaningful choices in the education of such children.

Thus, the IDEA reflects "Congress' unquestioned desire to wrest from school officials their former unilateral authority to determine the placement" of children. *Honig v. Doe*, 484 U.S. 305, 321 (1987). "Congress sought to protect individual children by providing for parental involvement" in the child's education. *Board of Educ. v. Rowley*, 458 U.S. at 208. The hoped-for result was an agreement between officials and parents. Congress recognized, however, that when cooperation broke down school districts would hold a natural advantage. Congress sought to level the playing field by "insur[ing] the full participation of the parents" in the child's education. *School Comm. v. Department of Educ.*, 471 U.S. 351, 368 (1985). In addition, this Court has refused to allow overly technical readings of requirements the IDEA otherwise imposes on school districts to dilute the expanded role of parents.[6]

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[6] *See, e.g., Florence County Sch. Dist. v. Carter by Carter*, 114 S.Ct. 361 (1993) (district may not restrict parental placement to schools meeting "standards of state law" under § 1401(a)(18)(B) when the district has failed to provide an appropriate education); *School Comm. v. Department of Educ.*, 471 U.S. at 372-73 ("stay put" provision of

The Tenth Circuit decision cuts back on the choices given parents of children with disabilities (and thereby on debate over such choices during the preparation of an individualized education program ("IEP")) at just the historical moment that public school choices for nondisabled children are expanding dramatically. Many districts make alternative public schools or programs available to interested parents and students. Not satisfied with local initiatives, states have adopted provisions which require or encourage some degree of choice for parents within school districts, between districts, or in certain specified circumstances.[7] A growing number of states have provided for parental participation in creating and sending their children, at district expense, to quasi-independent public schools, often called charter schools.[8] While

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§ 1415(e)(3) is "largely for the benefit of the parents and the child" and does not defeat parental claim to reimbursement for unilateral placement).

[7] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 15-816 - 15-816.07 (1994 Cum. Supp.); CALIF. EDUC. CODE §§ 46601 - 46605 (West 1993); COLO. REV. STAT. §§ 22-36-101 - 22-36-106 (1994 Cum. Supp.); LA. REV. STAT. ANN. § 17:221.2 (West 1995 Cum. Supp.); MINN. STAT. ANN. § 120.062 (West 1993 and 1995 Cum. Supp.); OR. REV. STAT. § 329.585(g) (1993); TEX. EDUC. CODE ANN. § 11.27(b)(6) (West 1991); UT. CODE ANN. § 53A-1a-106(2)(c) (1994). *See also* HAW. REV. STAT. § 296C-2 (1994 Supp.)("school/community based management").

[8] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 15-181 - 15-189 (1994 Cum. Supp.); CALIF. EDUC. CODE §§ 47600 - 47625 (West 1993 and 1995 Cum. Supp.); COLO. REV. STAT. §§ 22-30.5-101 - 22-30.5-114 (1994 Cum. Supp.); GA. CODE ANN. § 20-2-255 (Michie 1995 Cum. Supp.); KAN. STAT. ANN. §§ 72-1903 - 72-1910 (1994 Cum. Supp.); MASS. GEN. L. ch. 71 § 89 (1995 Cum. Supp.); N.M. STAT. ANN. §§ 22-8A-1 - 22-8A-7 (Michie 1978); WIS. STAT. ANN. § 118.40 (West 1994 Cum. Supp.); WYO. STAT. §§ 21-3-201 - 21-3-207 (1995 Cum.

nondisabled children are beginning to enjoy expanded public schools of choice, the Tenth Circuit decision rejects a modest effort at parental choice -- requesting reasonable accommodation in a neighborhood school -- under the IDEA. A statute intended to give parents of children with disabilities more of a say in their child's education should not, especially now, be construed to give them less of a say. Indeed, this Court has recognized that Congress gave parents of children with disabilities significant opportunities to choose various forms of private education and still receive publicly supported educational and related services under the IDEA.[9] The parents' choice here would seem, by comparison, restrained.

Moreover, the parents' choice in this case is a natural, common, and "least restrictive" one. Children value being part of their neighborhood and knowing their neighbors.[10] For parents, neighborhood schooling "reflects the deeply felt desire of citizens for a sense of community in their schools." *Keyes v. School Dist. No. 1*, 413 U.S. at 246 (Powell, J.,

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Supp.). *See, also* HAW. REV. STAT. §§ 296-101 - 296-102 (1994 Supp.) ("student- centered schools"); MICH. COMP. LAWS §§ 380.501 - 380.518 (1995 Cum. Supp.) ("public school academies"); MINN. STAT. ANN., § 120.064 (West 1993 and 1995 Cum. Supp.) ("outcome based schools").

[9] *Florence County Sch. Dist. v. Carter by Carter*, 114 S.Ct. 361; *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S.Ct. 2462 (1993); *School Comm. v. Department of Educ.*, 471 U.S. 351.

[10] Ironically, neighborhood schooling can be a source of racial segregation. In contrast, it is an inherently integrative policy with regard to children with disabilities. Conversely, for children with disabilities, forced busing is social engineering in the service of segregation.

concurring in part and dissenting in part).[11] Moreover, a child's disability may make it especially difficult to take skills learned in separate schooling in another neighborhood and transfer those skills to some meaningful use at or near home. For these children being removed from the neighborhood may create daunting barriers to becoming part of their home community. Conversely, a child with a disability will in many cases encounter physical, transportation, and social obstacles to reaching a separate community where "their" school is located and be thus precluded from that community's organizations and events. In sum, in common with nondisabled children, but at times to a greater degree, "the most natural school environment" for a child with disabilities "is the neighborhood school."[12] Further, the attitudes of nondisabled children will be formed by the extent to which children with disabilities have become part of the full school community. For all these reasons, decisions to stay at or

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[11] As Justice Powell perceived, it is important for society that schools encourage community formation. "[W]e cannot learn toleration and respect for others in a vacuum. Nor can we learn or practice self-rule in isolation. As humans . . . [w]e only learn who we are, and gain some sense of the fullness of our human character, through dealing with others. Hence, it is the small associations and mediating bodies, where society is realized, that act as the seedbeds of the civic virtues. For it is in them that we learn the habits necessary to sustain democratic political life. To leave these seedbeds untended is to put the entire project of self-rule at grave risk. . . ." Thomas C. Kohler, *The Overlooked Middle*, 69 CHI-KENT L. REV. 224, 255 (1994).

[12] Howard P. Blackman, *Surmounting the Disability of Isolation*, THE SCHOOL ADMINISTRATOR 28 (February, 1992). *See also Improving the Implementation of the Individuals with Disabilities Education Act: Making Schools Work for All of America's Children* (May 9, 1995).

depart from a neighborhood school have important implications for the education of children with disabilities.

The Murrays sought for Tyler access to the most traditional choice in public education: the neighborhood school. To support that choice they did not ask for the exorbitant remodeling of a school building or some revolutionary change in pedagogy. Rather, the issue framed below is whether accommodating a child with disabilities in the neighborhood school is even a proper item on the public school agenda -- a matter for discussion during the IEP process between parents who desire this alternative and school officials who harbor doubts. The Tenth Circuit decision holds, without warrant in law, that no such discussion need be allowed. This Court should review and reverse this simultaneous depreciation of the value of parental involvement in the education of children with disabilities and the value of community in the education of us all.

CONCLUSION

For the foregoing reasons, amici suggest that the petition for writ of certiorari be granted.

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